

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1435 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

KALUMIYA DALUMIYA

Versus

STATE OF GUJARAT

Appearance:

MR GR SHAIKH for Petitioners

MR KG SHETH, Learned AGP for Respondent No. 1

RULE SERVED for Respondent No. 2

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 18/10/2000

C.A.V. JUDGEMENT

1. The petitioners abovenamed have preferred this petition under Article 227 of the Constitution of India read with section 79 A of the Bombay Land Revenue code challenging the judgment and order recorded by the Additional Chief Secretary (Appeals), Revenue Department, Government of Gujarat dated 31.1.1991 in Revision Application No. 22 of 1990 dismissing the said Revision Application of the petitioners.

2. The facts of the case may be briefly stated as under :

As per the case of the petitioners, they are owners and occupants of the agricultural land bearing Survey No. 72 admeasuring 4 guntha in the sim of village Talod in Prantij Taluka, of Banaskantha District. That, the petitioners have been cultivating the said land personally and they are in lawful possession thereof since very long time. It seems that the Collector, Sabarkantha had issued a direction to the Deputy Collector, Modasa to initiate proceedings against the petitioners for the alleged breach said to have been committed by the petitioners in respect of condition for the grant of the said land. That the Deputy Collector, Modasa accordingly issued show cause notice in case no. 186 of 1979 to the petitioners calling upon them to show cause as to why action be not taken against them for breach of condition under Section 79 A of the Bombay Land Revenue Code (for short "Code"). After inquiry it was held that the petitioners have sold the agricultural land to the deceased Galbaji Shikaji and, therefore, it was directed that the land be resumed by the State holding that there was violation of terms and conditions of the grant. It seems to be a case of the respondent that this was a new tenure land which couldnot be transferred. That since it was transferred without the permission of the Government, the transfer was illegal and, therefore, the Government was entitled to resume the said land. Therefore, orders have been passed accordingly.

3. The petitioners have challenged the aforesaid order on various grounds in this petition. It has been contended that the said order Annexure-B suffers from error of jurisdiction. That the respondent had no authority to undertake any inquiry since it was not Government land. That the land is of private ownership and, therefore, no inquiry could be undertaken by the officers of the respondent. That the authority has

committed error in law in holding that it was new tenure land and, therefore, transfer was impermissible. That the action has been taken after long lapse of time and, therefore, the said action cannot be sustained for any purpose. That the pervious records have not been considered by the said authority and, therefore, the orders passed by the respondents for resuming the land are illegal and unauthorized and deserve to be quashed and set aside. The petitioners have therefore prayed that the present petition be allowed and order passed by the respondent at Annexure-B be quashed and set aside.

4. On receiving the petition, rule was issued on 24.3.1992 and in response to the said service of rule, Mr. K.G.Sheth, learned AGP has appeared for the State. I have heard the learned advocates for the parties and have perused the papers.

5. The facts are not very much in dispute. However, it seems to be a case of the respondents that the land in question is a new tenure land. Therefore, transfer thereof was impermissible. That since there is an event of transfer of land in question in breach of condition, the land is required to be resumed by the State. Therefore, the question would arise as to whether the land in question is to a new tenure land. In order to support the contention, the learned advocate for the petitioner has relied upon the certificate issued by the Deputy Mamlatdar, Prantij dated 11.12.1990. It has been addressed to the petitioners and it has been stated that the record of the land bearing Survey No. 72 shows that in one of the column it has been shown as new condition and in this behalf, record from 1939 has been checked but there is no entry posted in this record showing that it was a new tenure land. That the aforesaid certificate was issued after verifying all records. This document clearly shows that there was no entry showing that it was a new tenure land. The records of 1939 have been checked and, thereafter, above said certificate was issued after examination of the said record. This shows that at least since 1939, there is no entry in the Government record of right showing that the land in question was a new tenure land. Mr. K.G.Sheth, learned AGP has relied upon a fact that new contract or new condition has been mentioned in village form 7/12 which has been produced at A/1, page-15 on wards. Now, this would not be a primary document. The entry would first be posted in village form -6. It would then be recorded in village form VIII-A. Thereafter, it would be again reflected in village form 7/12. However, the Deputy Mamlatdar has positively certified that no entry was posted in the records showing

that it was new tenure land. For that purpose, he has examined the records since 1939. There is no other material to show that the said land was shown as new tenure land in Government record.

6. Annexure-F page-38 is the village form -6 dated 28.11.1985. There, it has been observed that the land bearing survey no. 72 was new tenure land and yet, transaction for sale and mortgage had been entered into and land has been put to possession of the Galbaji Shikaji. Therefore, there was violation of condition and land was ordered to be resumed. Now, it is no doubt that on record the land has been ordered to be resumed by the State, saying that it was a new tenure land. Therefore, it was not transferable and yet, the dealing of sale and mortgage were entered into which would amount to violation of terms and conditions. At the same time, there is no other record available to show that the land was granted to particular person as a new tenure land. It is not explained by Mr. Sheth, learned AGP that as to on what basis the said land has been treated to be a new tenure land. Ordinarily, it would be understood that new tenure land is not transferable but when the matter comes to the Court, it becomes a duty of the State Government or its officers to show as to why this is to be treated as new tenure land and what is the meaning of new tenure land, such meaning must flow from some law, rules, orders, regulations or Government resolutions. Nothing has been produced on record. Nothing has been considered by the authority which decide that the land in question was a new tenure land.

7. Even if we consider the decision of the Government holding that the land was a new tenure land, there also it has not been explained as to on what basis the said land has been treated to be a new tenure land. It is more so when the records have been checked and verified right from 1939. So on one hand, the record shows that the land in question was not registered in Government record or new tenure land. There is no other evidence produced showing that this is a new tenure land. On the other hand, it has not been explained as to why the said land has been treated to be a new tenure land. On this aspect of the case, learned advocate for the petitioner has relied upon a decision of this Court recorded in the case of Chhotabhai Dahyabhai Tahkore Vs. State of Gujarat reported in 1997 (3) GLR 2016. There, it has been observed as follows :

"Though there was entry in the revenue record
that the land in dispute was new tenure land, it

was not sufficient to call for action on the part of the respondents for forfeiture of the land. In absence of any further mention of 'inalienability' or 'impartibility', of new tenure, how a person will come to know that the land is not transferable ? It becomes more important, when admittedly, neither in the Land Revenue Code nor in the Land Revenue Rules, "new tenure" has been defined. Conditions can be attached to the grant and the conditions may be 'inalienability', 'impartibility', or both. But merely on the mention of 'new tenure' it is difficult to expect from a person to accept that the land is inalienable or impartible or both. The entry upon which strong reliance has been placed to pass the order against the petitioner is of no substance and value."

8. In the present case also, it has been not shown that the land has been registered as new tenure land. Then the document under which the aforesaid land has been granted is also not on record. It is not the case of the State Government that the land was granted to the petitioners or their predecessors in title on a condition that there shall not be any transfer of land in future. It is not the case of the respondents that similar condition was recorded in Government record of right. It is to be seen that though the rule was served upon the respondents, they have not filed affidavit and have not controverted the allegations made in the petition by the petitioners that this was not a new tenure land. So on the one hand, no evidence is there to show that it is a new tenure land and on the other hand, there is no entry posted in respect to thereof. It has not been explained as to how the entry has been posted in village form 7/12. Mr. Sheth, learned AGP has argued that the petitioners themselves had applied for converting the land from new tenure land to old tenure land. However, proceedings started and when the petitioners had apprehension that the Government might resume the land on a say that it is a new tenure land. Then in order to play safe and protect the title and possession, the petitioners may have applied for such a prayer but that itself does not show and prove that it was admitted to be a new tenure land. Therefore, it cannot be said that there is an admission of the petitioners that it was a new tenure land. Suffice it to state that the record does not show that the land in question is a new tenure land and consequently, the first respondent was not justified in holding the suit land to be a new tenure land that in passing the order for resumption of land in question.

Mr. Sheth, learned AGP states that this is a petition under Article 227 of the Constitution of India and, therefore, Court cannot alter the finding of fact recorded by the lower authorities. There is no dispute with respect to that principle. At the same time, it is a fact that the authorities below have not at all taken into consideration that there was a total absence of evidence to show that the land in question was a new tenure land. After all, this is a matter of record of the Government and records should have been produced before the Authority and before the Court. The State Government appears to have produced no material either before the aforesaid authority or before this court to show that the land was granted as new tenure land and, therefore, it was not transferable. In fact, it was a case of no evidence before the first respondent on the point if or not it was a new tenure land.

9. In that view of the matter, it is extremely necessary to interfere with the said finding of the Government Authorities with a view to have substantial justification to the authority. Under these circumstances, I am of the opinion that the aforesaid order of the first respondent is illegal and is required to be quashed and set aside.

10. The result is that the petition will be required to be allowed and accordingly, the petition is allowed. The order passed by the Deputy Collector, Modasa in LND/Breach/Case No. 186 of 1979 dated 28.4.1985 at Annexure-B at page-22, the order passed by the learned Collector Sabarkantha in LND Appeal in 330 of 1990 dated 31.8.1990 and the order passed by the Additional Chief Secretary (appeal) Government of Gujarat at Ahmedbad in SRD/Appea

31.1.1991 at Annexure-D page- 29 are ordered to be quashed and set aside and the respondents are prevented from implementing the said orders against petitioners. Rule is made absolute to the aforesaid extent. There shall be no order as to costs.

(D.P.Buch,J)
(vipul)